IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. .....

In the Matter of the Application
of
CHARLES COLACICCO
to vacate a seizure in rem of an automobile.

CHARLES COLACICCO,
Petitioner.

—against—

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of Hon. George Murray Hulbert, District Judge is unreported. in 143 F (2d) 410.

The opinion of the Circuit Court of Appeals for the Second Circuit is unreported.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, Title 28, U. S. Code, Section 347 (a).

Statutes Involved

Internal Revenue Code, Title 26, U. S. Code, Section 3723:

> Judicial Proceedings to Enforce Forfeiture—
>
> (a) Nature and Venue.
>
> The proceedings to enforce such forfeiture shall be in the nature of a proceeding in rem in the district court of the United States for the district where such seizure is made.

Internal Revenue Code, Title 26, U. S. Code, Section 3724:

> Goods Valued at $500 or Less.
>
> In all cases of seizure of any goods, wares, or merchandise as being subject to forfeiture under any provision of the internal revenue laws which, in the opinion of the collector or deputy collector making the seizure, are of the appraised value of $500 or less, the said collector or deputy collector shall, except in cases otherwise provided, proceed as follows:
>
> (a) List and Appraisement.
>
> He shall cause a list containing a particular description of the goods, wares, or merchandise seized to be prepared in duplicate, and an appraisement thereof to be made by three sworn

appraisers, to be selected by him, who shall be respectable and disinterested citizens of the United States residing within the collection district wherein the seizure was made. Said list and appraisement shall be properly attested by the said collector or deputy collector and the said appraisers, for which service each of the said appraisers shall be allowed the sum of $1.50 a day, to be paid in the manner provided by law for other necessary charges of collectors.

(b) Notice of Seizure.

If the said goods are found by the said appraisers to be of the value of $500 or less, the said collector or deputy collector shall publish a notice, for three weeks, in some newspaper of the district where the seizure was made, describing the articles, and stating the time, place, and cause of their seizure, and requiring any person claiming them to appear and make such claim within thirty days from the date of the first publication of such notice.

(c) Execution of Bond by Claimant.

Any person claiming the goods, wares, or merchandise so seized, within the time specified in the notice, may file with the said collector or deputy collector a claim, stating his interest in the articles seized, and may execute a bond to the United States in the penal sum of $250, with sureties to be approved by the said collector or deputy collector, conditioned that, in case of condemnation of the articles so seized, the obligors shall pay all the costs and expenses of the proceedings to obtain such condemnation; and upon the delivery of such

bond to the collector or deputy collector, he shall transmit the same, with the duplicate list or description of the goods seized, to the United States district attorney for the district, and said attorney shall proceed thereon in the ordinary manner prescribed by law.

(d) SALE IN ABSENCE OF BOND.

If no claim is interposed and no bond is given within the time above specified, the collector or deputy collector, as the case may be, shall give ten days' notice of the sale of the goods, wares, or merchandise by publication, and, at the time and place specified in the notice, shall sell the articles so seized at public auction.

(e) DEPOSIT OF PROCEEDS OF SALE.

After deducting the expenses of appraisement and sale, the collector or deputy collector, as the case may be, shall deposit the proceeds to the credit of the Secretary.

(f) REMISSION OF FORFEITURE—(1) CLAIM.

Within one year after the sale of any goods, wares, or merchandise, as provided in the preceding subsections, any person claiming to be interested in the property sold, may apply to the Secretary for a remission of the forfeiture thereof, or of any part thereof, and a restoration of the proceeds of the sale.

(2) ALLOWANCE.

The Secretary may grant the same upon satisfactory proof, to be furnished in such manner as

he shall prescribe: PROVIDED, That it shall be satisfactorily shown—

(A) That the applicant, at the time of the seizure and sale of the said property, and during the intervening time, was absent, out of the United States, or in such circumstances as prevented him from knowing of the seizure, and that he did not know of the same; and also

(B) That the said forfeiture was incurred without willful negligence or any intention of fraud on the part of the owner of said property.

(g) DISTRIBUTION OF PROCEEDS OF SALE.

If no application for restoration of the proceeds is made within one year, as prescribed in the foregoing subsection, the Secretary shall, at the expiration of the said time, cause the proceeds of the sale of the said property to be distributed according to law, as in the case of goods, wares, or merchandise condemned and sold pursuant to the decree of a competent court. (53 Stat. 458.)

Title 40, U. S. Code, Section 304 (h):

DISPOSITION OF PROPERTY FORFEITED TO UNITED STATES.

In the event that any property seized by any agency is or has been forfeited to the United States otherwise than by court decree, it may, in the event that the property is not ordered by competent authority to be returned to any claimant, and in lieu of being disposed of as otherwise provided by law (including advertisement for sale, and sale), be retained by such agency and devoted

to official use only. If such agency shall not desire so to retain such property, the head thereof shall forthwith notify the Director to that effect, and such property shall—

(a) In the event that it is not ordered by competent authority to be returned to any claimant, and in lieu of being disposed of as otherwise provided by law (including advertisement for sale, and sale), be delivered by such agency, upon order of the Director given within a reasonable time, to any other agency which requests and in the judgment of the Director should be given the property, or

(b) upon order of the Director given within a reasonable time, be disposed of as otherwise provided by law. (Aug. 27, 1935, ch. 740, §303, 49 Stat. 879.)

Title 28, U. S. Code, Section 747:

"All property taken or detained by any officer or other person, under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

Cases Cited

In re Behrens, 39 Fed. (2d) 561;

Goldman v. *American Dealers Service, Inc.*, 49 Fed. Supp. 933, aff'd 135 Fed. (2d) 398;

Dobbins Distillery v. *U. S.*, 96 U. S. 395;

Fishburn v. *Jackson*, 55 Fed. (2d) 934;

McGuire v. *Winslow*, 26 Fed. 304;

Milkint, et al. v. *Morgenthau*, 92 Fed. (2d) 266;

The Schooner "Anne", 9 Cranch 289;

U. S. v. *Chichelli*, 10 Fed. Supp. 900.

Specifications of Errors

The learned Circuit Court of Appeals erred in holding:

1. That the notice required under Section 3724 (b) Internal Revenue Code, to appear and claim the car within thirty days was duly published.

2. That petitioner did not raise any question that the automobile was assigned for government use instead of selling it at public auction on ten days' notice, as required by Section 3724 (d), Internal Revenue Code.

3. That petitioner raises no question as to the legality of the seizure.

4. That the District Judge dismissed the petition because the forfeiture was within the terms of the statute.

5. In effect that the appraisal made could not be attacked and irrespective of the actual value of the property was sufficient to warrant the Collector in proceeding to forfeit the property under the provisions of Section 3724 of the Internal Revenue Code.

6. That the administrative forfeiture was valid and unassailable by reason of the failure of petitioner to file the $250 cost bond required by Section 3724 (c) and file a claim within the time limited by said statute.

Statement

Under the heading "*Summary Statement*" hereinabove an outline of the facts and proceedings are set forth up to the affirmance of the order of the District Court. After said affirmance petitioner filed a Petition for Rehearing and leave to submit further evidence.

Petitioner requested leave to submit further evidence upon the theory that this proceeding is one in Admiralty. In view of the fact that the Circuit Court of Appeals specifically held, in its opinion, that the District Court has jurisdiction and in view of the fact that the issue in the District Court was confined to the sole question of jurisdiction by reason of the basis stated by District Court for the dismissal of the petition therein, petitioner contended that the Circuit Court of Appeals should have directed that evidence on the question of the compliance by the Collector with the provisions of Section 3724 of the Internal Revenue Code be submitted and that upon said evidence that question be decided and if it were determined that he did not comply that the order appealed from be reversed and the administrative forfeiture be vacated. The reasoning advanced by petitioner for the granting of said requested relief was that the United States Attorney did not file any pleading and in view of that fact, in conjunction with the fact that the decision of the District Court rested solely upon its conclusion that it had no jurisdiction, the matter before the Circuit Court of Appeals was the same

as though it were a decision upon a motion made by the United States Attorney to dismiss the petition on the ground that the District Court has no jurisdiction. The petition for rehearing was denied.

ARGUMENT

The difference of opinion which brings this case to this Court seems to stem from the creation of an anomolous situation in that the basic contention of petitioner was upheld by the Circuit Court of Appeals, contrary to the view of the District Court, but nevertheless he apparently is denied the relief which would seem to be entitled to as a natural result of the finding by the Circuit Court that the District Court had jurisdiction.

Counsel is aware of the fact that the opinion of the Circuit Court of Appeals indicates that the issues, for a decision on which petitioner prayed the District Court, were in fact decided. The issues presented by petitioner were the illegality of the seizure, the non-compliance by the Collector with the provisions of the Internal Revenue Code, (Sections 3723 and 3724) and the contention that if said Section 3724 precluded the District Court from taking jurisdiction because of the failure of petioner to file a claim and post a bond of $250 within the time limited by said statute, then and in that event, the said statute was unconstitutional in that it deprived petitioner of his property without due process of law.

There can be no dispute about the fact that the dismissal of the petition in the District Court was predicated solely upon the conclusion that the District Court had no jurisdiction. The opinion of the District Court and order entered upon said dismissal and appealed from so stated specifically.

It is true that the District Judge, in his opinion, stated certain conclusions, but, in view of the expressed basis of the dismissal, it is respectfully submitted that said conclusions were *obiter dicta* and should not have been considered by the Circuit Court of Appeals.

The Transcript of Record agreed upon and presented to the Circuit Court of Appeals consisted of the testimony of the Government appraiser, the opinion of the Court and the petition, besides the usual procedural papers, and the points of appellant were directed to the question of jurisdiction presented by the decision of the District Court. Appellant did not make a point of the non-compliance by the Collector with the provisions of Sections 3723 and 3724 of the Internal Revenue Code, but the Record and Brief both referred to the contention of petitioner to that effect. Appellant did not make a point of the illegality of the seizure or the admitted erroneous valuation placed upon the automobile by the Government appraiser, but the Record and Brief both referred to the contention of petitioner to that effect.

Appellant certainly did not concede that the procedure followed by the Collector was sufficient under the law, nor did he concede that the seizure was legal or justified.

The testimony presented by the Government did not show compliance with the statutes in question.

It is respectfully submitted that petitioner did raise the question of non-compliance and illegality of seizure, even though specific points were not set forth concerning them, by the presentation of the matter in the Record and Brief. Since the decision appealed from was predicted upon the conclusion that the District Court had no jurisdiction, there was no reason to stress points that might only be important if jurisdiction existed.

The argument and brief of Appellee in the District Court and Circuit Court of Appeals was directed to the alleged lack of jurisdiction on the part of the District Court and the contention that the proceeding under Section 3723 was exclusive and the forfeiture thereunder precluded the Court from taking jurisdiction. The cases cited and relied upon by Appellee were decided upon the theory that the administrative forfeiture was exclusive and precluded the District Court from taking jurisdiction. The decision of the Circuit Court of Appeals herein, however, held that the District Court did have jurisdiction under Title 28, U. S. Code, Section 747. Therein lies the inexplicable anomoly. Inexplicable, at any rate, to counsel for petitioner herein.

If the conclusions or presumptions indulged in by the District Court, as to compliance and illegality, could be construed as being material in any sense so as to permit their adoption by the Circuit Court of Appeals as a basis for its affirmance, then, it is respectfully submitted that the learned Circuit Court of Appeals, as well as the District Court, erred. The point made herein is not that those conclusions are contrary to the weight of evidence, but, rather, that there is no evidence upon which those conclusions can be based.

It is respectfully submitted that this proceeding is one in Admiralty.

If counsel is correct in that contention both the Circuit Court of Appeals and this Court have the right to call for additional evidence.

The essential characteristic and the ultimate result sought to be accomplished by the provisions of the Constitution guaranteeing due process is that technicalities shall not be sufficient to constitute a bar to the preservation of elementary and fundamental rights. The

right to be secure in one's person and property is the fundamental right herein involved.

As the situation now stands petitioner's property was seized without warrant upon a charge that it was used in violation of the Internal Revenue Laws, but the fact is and still remains that he has been deprived of the right to come into court or before a judicial or quasi-judicial body to defend his property on the merits. His property has been forfeited although the forfeiture was not in compliance with the statutes in such cases made and provided. Certainly the arbitrary and baseless erroneous appraisal cannot be considered sacrosanct to the point where, once it has been shown to be erroneous without question, a person is nevertheless deprived of his rights guaranteed by the Constitution and provided for in Section 3723 of the Internal Revenue Code.

The assumption by the learned Courts below, of compliance with the procedural requirements of Section 3724 has absolutely no basis, unless counsel's construction of the law is completely erroneous. Surely, the forfeiture of property, without a trial on the merits, is repugnant to the nth degree. Can it be said that a presumption of compliance, if indeed there can be any such thing as to the prerequisites to an ex-parte forfeiture proceeding, satisfies the requirements of due process in a case such as this? We cannot believe that to be the law.

CONCLUSION

It is respectfully submitted that the decision of the Circuit Court of Appeals is incorrect. The result reached by the Courts below should be met with an authoritative disapproval. A question of general importance is involved. The petition should be granted.

Respectfully submitted,

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